

³ The Board notes that, following the July 19, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On September 25, 2017 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his knees on September 23, 2017 when he jumped onto the hood of a car to avoid a dog attack while in the performance of duty. He stopped work on September 25, 2017. OWCP accepted the claim for sprain of ligaments of lumbar spine, contusion of right knee, contusion of left knee, and aggravation primary osteoarthritis of knees. It paid appellant wage-loss compensation benefits. On February 16, 2018 he returned to modified-duty work for six hours per day, with restrictions. Appellant stopped work again on March 28, 2018.

Appellant filed wage-loss compensation claims (Form CA-7) for disability during the period March 28 through May 11, 2018.

By decision dated May 25, 2018, OWCP denied the wage-loss compensation claims for the period March 28 through May 11, 2018 as the medical evidence of record did not establish that appellant's disability was due to the accepted September 23, 2017 employment injury.⁴

OWCP subsequently received a May 11, 2018 duty status report (Form CA-17) wherein Dr. Robert Helsten, a physiatrist, opined that appellant could perform modified duties at work for eight hours a day.

In a June 11, 2018 report, Dr. Karim A. Meijer, an orthopedic surgeon, noted that appellant had previously undergone left knee replacement in December 2016. He also noted the history of injury and that appellant had developed significant swelling in his bilateral lower extremities. Dr. Meijer reported that x-rays of appellant's left knee taken that day showed a well-placed total left knee arthroplasty without evidence of loosening. He provided an impression of "left knee pain after a total knee arthroplasty."

Medical reports from Dr. Donald Wayne Hohman, Jr., a Board-certified orthopedic surgeon, dated June 21, 2018 through May 1, 2019 were also submitted. In his initial report of June 21, 2018, Dr. Hohman noted that appellant reported that his knee pain had been present for one year, but had been severe for three months and worsened with weight bearing and prolonged walking. He provided an assessment of instability of internal left knee prosthesis. He indicated that if appellant responded favorably to brace management then appellant may be a candidate for revision arthroplasty. Dr. Hohman continued to submit progress notes, noting that appellant had an unstable left knee replacement.

On September 6, 2018 Dr. Edward F. Wolski placed appellant off work in preparation for the planned left knee revision arthroplasty. He indicated that, since appellant's return to light duty, appellant had experienced a significant increase in swelling of both knees, and that he could not

⁴ Appellant continued to file Form CA-7 claims for compensation. OWCP has not, however, issued a final decision for periods claimed prior to September 6, 2018 and thus that period is not presently before the Board on this appeal. Appellant was placed on the supplemental rolls on September 6, 2018.

tolerate weight bearing for longer than one hour. Dr. Wolski opined that appellant's period of total disability began on March 27, 2018. He indicated that appellant had failed conservative treatment and continued with pain, weakness, limited active range of motion, and knee instability. Dr. Wolski noted that Dr. Homan felt that appellant was a candidate for arthroplasty revision and opined that appellant would experience improvement if he underwent the proposed procedure. He further opined that, following left knee surgery, appellant would require intensive physical medicine and that appellant would be totally disabled from any work until at least November 1, 2018. Additional progress reports dated September 20 and October 23, 2018 and January 29, 2019 were received.⁵

On February 14, 2019 OWCP resent a copy of the May 25, 2018 formal decision at appellant's request.

On June 7, 2019 appellant, through counsel, requested reconsideration.

OWCP subsequently received additional evidence. In a January 29, 2019 report, Dr. Wolski opined that appellant's jumping on the hood of a car to avoid a dog and landing on his knees on September 23, 2017 resulted in a worsening of his lumbar spinal stenosis, lumbar spondylosis, and bilateral osteoarthritis of the knee and caused a right knee meniscal tear. He also opined that appellant was unable to return to work since March 27, 2018. Dr. Wolski indicated that the September 23, 2017 employment injury resulted in gait issues which weakened appellant's prior knee replacement. Further, with the meniscus tear, appellant was not physically capable of walking more than three hours without impeding the recovery to his knees and experiencing severe pain. Dr. Wolski indicated that, due to the conditions in appellant's knees, appellant was released to work with restrictions of walking only three hours. However, after returning to work on February 5, 2018 in a light-duty position, appellant reported that it took longer than the prescribed three hours for him to complete his light-duty route based on his walking restrictions. Dr. Wolski indicated that this caused increased swelling and pain to appellant's knees and he placed appellant off work starting March 27, 2019. He indicated that appellant had additional treatment and appellant was again released to work with restrictions starting April 27, 2018. Dr. Wolski noted that appellant returned to work on that day, but after working an hour and half, appellant's supervisor sent appellant home as there was no work available within those restrictions. He indicated that appellant was put in a knee brace due to ongoing knee instability and was recommended for a revision arthroplasty to the left knee. Dr. Wolski opined that appellant had been disabled from returning to work due to his employment-related conditions commencing March 27, 2018.

By decision dated August 1, 2019, OWCP denied appellant's June 7, 2019 reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

⁵ OWCP received multiple medical reports from Dr. Helsten, dated September 26, 2017 and October 1, 2018, and onward requesting preauthorization for physical therapy. It also received diagnostic testing, multiple physical therapy reports dated August 14 and September 10 and 26, 2018, and April 12 and July 8, 2019. On October 1, 2018 Dr. Helsten medically cleared appellant for revision of his left knee replacement. Appellant underwent an arthroplasty revision total left knee with anterior synovectomy, on October 12, 2018 which Dr. Hohman, performed.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁶ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁷ Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS).⁸ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁹

OWCP may not deny a reconsideration request solely because it was untimely filed. When a claimant's request is untimely filed, it must nevertheless undertake a limited review to determine whether it demonstrates clear evidence of error.¹⁰ If a request for reconsideration demonstrates clear evidence of error, OWCP will reopen the case for merit review.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP. The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹²

OWCP procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have

⁶ 5 U.S.C. § 8128(a); *U.C.*, Docket No. 19-1753 (issued June 10, 2020); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁷ 20 C.F.R. § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁹ *T.C.*, Docket No. 19-1709 (issued June 5, 2020); *R.L.*, Docket No. 18-0496 (issued January 9, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ See 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

¹¹ *U.C.*, *supra* note 6; *M.L.*, Docket No. 09-0956 (issued April 15, 2010). See also *id.* at § 10.607(b); *supra* note 8 at Chapter 2.1602.5 (February 2016).

¹² *T.W.*, Docket No. 19-1821 (issued May 15, 2020); *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

created a conflict in medical opinion requiring further development, is not clear evidence of error.¹³ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁴

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

OWCP received appellant's request for reconsideration on June 7, 2019 more than one year after OWCP's May 25, 2018 merit decision. As appellant's June 7, 2019 reconsideration request was untimely filed, consequently he must demonstrate clear evidence of error on the part of OWCP.¹⁵

The Board further finds that appellant has not demonstrated clear evidence of error in the May 25, 2018 decision. The underlying issue is whether appellant has established total disability for the period March 28 through May 11, 2018.

On reconsideration appellant submitted a January 29, 2019 report by Dr. Wolski who opined that appellant's September 23, 2017 employment injury resulted in appellant's period of disability from work starting March 27, 2019. While Dr. Wolski in this report, and his September 6, 2018 report was generally supportive of appellant's claim for disability benefits, as noted above, the Board has held that, even evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, does not demonstrate clear evidence of error.¹⁶ Consequently, his reports are insufficient to demonstrate clear evidence of error in the May 25, 2018 merit decision.

None of the other evidence submitted by appellant on reconsideration, including the reports of Drs. Meijer, Currin, Hohman, and Helsten and the diagnostic testing, raised a substantial question as to the correctness of OWCP's denial of appellant's claim as those physicians did not provide a medical opinion explaining how appellant's accepted conditions disabled from his modified duties during the period in question. Evidence that is not pertinent to the issue on which the claim was denied is insufficient to demonstrate clear evidence of error.¹⁷

The term clear evidence of error is intended to represent a difficult standard. The Board finds that the evidence and arguments submitted on reconsideration do not demonstrate clear

¹³ *L.N.*, Docket No. 20-0742 (issued October 26, 2020); *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 8 at Chapter 2.1602.5(a) (February 2016).

¹⁴ *U.C.*, *supra* note 6; *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁵ 20 C.F.R. § 10.607(b).

¹⁶ *See A.B.*, Docket No. 19-1539 (issued January 27, 2020); *A.A.*, Docket No. 19-1219 (issued December 10, 2019).

¹⁷ *S.E.*, Docket No. 16-1258 (issued December 5, 2016); *B.F.*, Docket No. 11-1181 (issued December 8, 2011); *F.R.*, Docket No. 09-0575 (issued January 4, 2010).

evidence of error on the part of OWCP in its May 25, 2018 merit decision.¹⁸ For these reasons, the Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On appeal, appellant, through counsel, contends that the request for reconsideration was timely filed from the "February 14, 2019 decision." The Board finds that the February 14, 2019 document was an informational letter and does not constitute a final adverse decision.¹⁹ Therefore, the one-year period to request a timely reconsideration is based upon the May 25, 2018 merit decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

¹⁸ *R.T.*, Docket No. 20-0298 (issued August 6, 2020); *W.R.*, Docket No. 18-1042 (issued February 12, 2019).

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 17, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board